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No. 285.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

SOUTHERN PACIFIC COMPANY, *Appellant,*

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Southern Pacific Company, *Appellant*,

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Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

Statement of the Case.

The Southern Pacific Company sued in the Court of Claims to recover certain amounts, required (by the decisions of the Comptroller of the Treasury in effect at that time) to be deducted on account of "land grant," as for "troops of the United States," in the bills or vouchers rendered by plaintiff to a disbursing officer of the United States, for the transportation, between March 1, 1912, and June 18, 1916, of (1) applicants for enlistment in the Army (accepted and rejected), (2) discharged military prisoners, (3) discharged

soldiers, (4) retired soldiers, (5) furloughed soldiers, and (6) civilian employees of the War Department.

Some other classes of persons were also included in the petition, as amended, but appellant subsequently waived its claim as to them, without conceding the principle involved. (Finding of Fact X, Rec., 8.) Appellant also eliminated from its claim land-grant deductions made subsequent to June 18, 1916, when a special agreement between the railroads and the Government as to the transportation of the aforesaid classes of persons was in force. (*Ib.*)

In *Union Pacific Railroad Company* v. *United States* (52 C. Cls. 226; affirmed 249 U. S. 354), it was held that none of the first five of the above mentioned classes of persons were "troops of the United States" within the provisions of the railroad land-grant Acts of Congress requiring reduced rates for the transportation of troops and property of the United States. And the Court of Claims, in its opinion in this case, also holds that "civilian employees of the War Department" are not "troops of the United States" within the meaning of the railroad land-grant Acts (Rec., 10), the Attorney General and the Comptroller General having reached a like conclusion as to said persons since the Union Pacific Case was decided (1 Comp. Gen. 233; 33 Op. A. G., 40). So that the status of such persons is not in dispute on this appeal.

The findings of fact made by the Court of Claims (Rec., 5-9), show that prior to January 1, 1914, appellant rendered its bills for the transportation of the aforesaid six classes of persons, upon the prescribed form of Government voucher, to the Depot Quartermaster of the Army at San Francisco (the disbursing

officer of the Government authorized to pay such bills), at the reduced fares applicable to troops of the United States, without any specific protest against being required to make such deductions; but that, beginning January 1, 1914, appellant wrote or stamped on its bills for the transportation of said six classes of persons, rendered to the Depot Quartermaster of the Army at San Francisco, the following form of protest:

> "Amounts claimed in this bill accepted under protest."

The Court of Claims further found that, beginning October 1, 1914, appellant "systematically" typed on its bills a longer and more explicit form of protest, reading as follows:

> "As U. S. Government accounting officers claim they have no authority to allow or pay for the transportation of discharged soldiers more than the fares for troops of the U. S., such fares are shown herein but under protest and S. P. Co. for itself and connecting carriers does not waive any of its rights to full published tariff fares and any payment at any less amount will be accepted as part payment only for the services performed."

The Court of Claims—while recognizing that, prior to the times referred to herein, the Comptroller of the Treasury had ruled that said several classes of persons were to be regarded as "troops of the United States," and that the disbursing officer could only pay plaintiff for such transportation the amount authorized by the decisions of the Comptroller of the Treasury—held, that appellant was not only *not* entitled to recover the amount of such deductions where it had accepted payment on a land-grant basis without pro-

test, *but also that it was not entitled to recover the amounts so required to be deducted even though appellant's bills for such transportation were rendered to the United States disbursing officer under specific written protest against the acceptance of payment on such basis, in the form and manner above set forth.* It therefore dismissed the petition, and the company appealed to this court.

The total amount of land-grant deductions involved in this case, as finally presented to the Court of Claims, is $186,282.20. Of this amount $39,253.54 occurred prior to January 1, 1914, when appellant began to accept payment on a land-grant basis under protest; $71,560.92 occurred between January 1, 1914, and October 1, 1914, when the short form of protest was being used, and $75,467.74 between October 1, 1914, and June 18, 1916, when the long form of protest was used. (Findings of Fact VII, VIII and IX, Rec. 7-8.)

ARGUMENT.

I.

Issues Presented on This Appeal.

In view of the findings of fact made by the Court of Claims, counsel for appellant recognize that, under the doctrine announced by this court in *Oregon-Washington Railroad & Navigation Company* v. *United States* (255 U. S. 339), appellant may be held to have "conceded" the land-grant rate as to all transportation occurring between March 1, 1912, and January 1, 1914, because of its having presented its bills on the land-grant basis without protest or other objection (except one bill for transportation performed in September, 1913, which bore the short form of protest, and in-

volved deducted land-grant to the amount of $294.06, as set out in Finding of Fact IX. It is probable that this bill was rendered after January 1, 1914).

As to all transportation of the character referred to herein occurring after January 1, 1914, involved in this suit, appellant contends that it is entitled to recover the balances deducted on account of land-grant because, on and after that date, the Government was fully advised that appellant was accepting payment for such transportation on a land-grant basis *under protest*. In any event, appellant should be held entitled to recover as to the items specifically protested.

The gist of the opinion of this court in the *Oregon-Washington Case* is that the circumstances thereof implied a "concession" by the railroad company of the land-grant rate, although the property transported was not property of the United States. This distinctly appears from the following statement in the opinion (255 U. S., at pp. 339, 347-8):

> "These views lead to an affirmance of the judgment upon the record as it now stands. It should be said, however, that they are based on the *concessions of appellant to the action of the accounting officers,*" etc.

We submit that the circumstances of this case, as disclosed by the record herein, absolutely negative any intention on the part of the plaintiff company to "concede" the land-grant fare as to the classes of persons referred to herein after January 1, 1914. Not only does the record show that the plaintiff, from that date, attached specific protests to its bills in a sufficiently large number of cases to show that it was not "con-

ceding" the land-grant deductions, but as the Court of Claims also finds (Finding of Fact XI, Rec., 9):

> "At some time in the latter part of 1914, the Union Pacific Railway Company, *which was then represented in Washington in the matter of claims against the Government by the same attorney who represented the plaintiff company in the same capacity,* presented its claim to the Auditor for the War Department for the transportation at regular published passenger rates of certain rejected applicants for enlistment, discharged military prisoners, discharged enlisted men, retired enlisted men, and furloughed men returning to their stations, which the auditor disallowed to the extent of the applicable land grant, and upon appeal to the Comptroller of the Treasury, the Comptroller, on March 24, 1915, affirmed the action of the auditor.
>
> Thereupon that company commenced its action in this court (case No. 3305) on April 29, 1915, which was decided by this court February 19, 1917 (52 Ct. Cl. 226), and on appeal affirmed by the Supreme Court (249 U. S. 354)."

And on March 1, 1918, after the affirmance of said Union Pacific case by this Court, the Southern Pacific Company, through the same attorney, filed this suit in the Court of Claims (Rec. 1, 3).

In other words, the Union Pacific case was prosecuted as a "test" case before the Treasury Department and in the Court of Claims by the attorney at Washington, of counsel here, who was representing both that Company and the Southern Pacific Company in the matter of claims against the Government. And it appears from the opinion of the Comptroller of the Treasury in the Union Pacific case that that decision

had reference to transportation occurring during the fiscal year July 1, 1913, to June 30, 1914 (21 Comp. Dec. 651). In order to reopen this question before the accounting officers, it also appears from said opinion, the Union Pacific Company presented its bills for the transportation referred to therein at full commercial fares. That appellant did not follow that course during the same period was doubtless due to the fact that it thought such an appeal to the accounting officers of the Government would be of no avail—and the event showed that this supposition was correct. Appellant contented itself, therefore, during said period, and until the Union Pacific case was decided by the Court of Claims, with presenting its bills at land-grant rates and accepting payment at such rates under protest, so as to preserve its right to sue in the Court of Claims for the land-grant deductions.

The case of *Western Pacific R. R. C.. United States* (No. 287 of this term), also before this court on appeal from the Court of Claims, shows that other railroad companies were also following the same practice of rendering their bills, to disbursing officers, for the transportation of the several classes of persons involved herein, upon a land-grant basis, under protest. That case covers transportation between September, 1914, and June 18, 1916.

II.

As to the Sufficiency of the Short Form of Protest.

The short form of protest, written, typewritten or stamped upon plaintiff's bills or vouchers, read:

"Amounts claimed in this bill accepted under protest."

(Findings of Fact VI, Rec. 6.)

The Court of Claims holds this form of protest insufficient on the ground that it did not sufficiently advise the disbursing quartermaster of the Army at San Francisco, to whom all of said bills or vouchers were presented, and by whom they were all paid, what the plaintiff was protesting against. This view cannot, we submit, be sustained in view of the Court's own findings.

In Finding of Fact V the court states (Rec. 6):

> "For all such transportation plaintiff stated its bills on the prescribed form of voucher for transportation subject to land-grant deductions, stating therein in appropriate columns the mileage of land grant road, the number of men, the rate per man, the gross amount, the 'amount to be deducted on account of land-grant' and in the final column the 'amount claimed' which was the gross amount less land-grant deduction, and certified the account as stated to be correct."

As, according to these findings, it appears that the "amounts claimed" in said bills or vouchers were the amounts due on a land-grant basis, it would seem apparent, without any further explanation, that what the Company was accepting, under protest, was payment upon that basis. *On the face of the bills as rendered,* according to the findings, there was nothing else that the protest could apply to.

Any possible doubt on this subject would seem to be removed by the further finding of the Court of Claims that "the short form" of protest was under-

stood by the clerk who handled these bills in the office of the disbursing quartermaster at San Francisco (who was "head clerk" in that office for part of the time, Rec. 15), "*as addressed to the matter of land-grant rates and to be for the purpose, on the part of the plaintiff, of reserving a right to present a further claim for full commercial fares to the accounting officers or the courts.*" (Finding of Fact VI, Rec. 6-7.)

In discussing this matter in its opinion, the Court of Claims seems to think that this understanding of the clerk in the disbursing quartermaster's office at San Francisco who handled these bills, as to what was meant by the short form of protest, cannot be imputed to the disbursing quartermaster himself (Rec. 15); but since the disbursing quartermaster was acting in this matter through said agent, we think it follows, as a matter of law, that the understanding which this agent had as to the purpose of the protest is to be imputed to that official.

It is also to be noted that, as the Court of Claims further states, in its opinion, the "passenger rate clerk on the transportation rate board in the General Accounting Office," whose duty it was to audit such bills, when questioned about the matter, testified that "it was his understanding that in using such form of protest the plaintiff company was protesting against making any land-grant deduction." (Rec. 14.) All of which goes to show that it was perfectly apparent from the way the bills were rendered that the company was protesting the requirement of land-grant deductions.

In any event, this short form of protest was sufficient to advise the disbursing quartermaster that the reduced amounts claimed (whatever the specific

ground of objection) were not being accepted as in full for the service performed, and thereby a "concession" of the land-grant fare was absolutely negatived.

The Court of Claims calls attention to the fact that between January 1, 1914, and October 1, 1914, when the short form of protest was being used, a very large number of plaintiff's bills for this class of transportation bore no protest. But the fact that 201 vouchers, involving over $24,000 of land-grant, were protested during this period was certainly sufficient to put the office of the disbursing quartermaster at San Francisco on notice that the plaintiff was not "conceding" the land-grant rate, *and that was the only purpose to be subserved by such protests.* Any failure to physically file protest in a particular case would not impair this purpose.

From the very first protest of this kind, the disbursing quartermaster (as the agent of the Government) was put upon notice that the plaintiff was insisting upon payment at full commercial fares upon these classes of transportation, and unless an abandonment of such claim is to be inferred from its subsequent action, the land-grant rate is not to be held to have been conceded. So far from abandoning its claim, the findings show that the plaintiff continued thereafter to protest these payments with increasing regularity and particularity.

In the *Railway Mail Service Cases* (103 U. S. 703, affirming 13 C. Cls. 199), the right of the railroads to recover a statutory rate of compensation for the transportation of the mails, was held to date from the time protest was first made. And so, we submit, in this case, the plaintiff is entitled to recover the balances due on account of land-grant deductions (required, as found

by the Court of Claims, by the decisions of the Comptroller of the Treasury) on all such bills rendered subsequent to January 1, 1914, when it began to register its protest against the requirement of land-grant deductions upon the face of the bills or vouchers which it presented to the Government disbursing officers. On and after that date, no "concession" of the land-grant fare can, under the circumstances of this case, be fairly implied.

This is manifestly a very different case from the *Oregon-Washington case, supra,* because in that case said company, during the entire period covered by that suit, presented its bills at land-grant rates, and accepted payment at such rates, *without any protest whatsoever.* In other words, in that case, *down to the filing of that suit,* there was a long and unbroken period of acquiescence on the part of the carrier in the view that the household goods of Army officers changing station, within their change of station allowance, were subject to land-grant deductions. But here, beginning January, 1914, there was continuous insistence by the carrier that it was entitled to full commercial fares for the transportation of the several classes of persons referred to herein.

That the protest was omitted from a number of the bills was manifestly a clerical neglect and could not have misled the disbursing quartermaster at San Francisco who paid all said bills and who was the authorized agent of the Government in this matter.

It is also to be borne in mind, in this connection, that, as found by the Court of Claims:

> "At various times prior to the furnishing of the transportation here involved the Comptroller of

the Treasury had held that the land-grant railroads could be paid for the transportation of the classes of persons enumerated in the *Union Pacific Case, supra,* only at land-grant rates and disbursing officers were authorized to make payment on that basis only." (Finding of Fact XI, Rec. 8-9.)

As a matter of fact, the Comptroller of the Treasury had gone even further, and, at and prior to the transportation referred to herein, "the established construction" of the railroad land-grant Acts was "*that the term 'troops' as used therein applies to all persons for whom transportation is required by the United States in connection with its military service,*" including civilian employees and agents. (Decision of Comptroller Downey of March 24, 1915, 21 Comp. Dec. 651, 657, and former Comptrollers' decisions therein cited.)

The Court of Claims recognizes that it was the duty of the disbursing quartermasters of the Army to keep themselves advised as to the Comptroller's decisions, (whose decisions are, by Sec. 8 of the Dockery Act, 28 Stat. 207, made "final and conclusive upon the Executive branch of the Government"), and to pay no more for *Army transportation* than those decisions would permit.

III.

The Long Form of Protest.

Beginning with October, 1914, according to the findings of the Court of Claims, plaintiff began "systematically" to type on its bills the long form of protest (Finding of Fact VIII, Rec. 7). Said protest read:

> "As U. S. Government accounting officers claim they have no authority to allow or pay for the transportation of discharged soldiers more than the fares for troops of the U. S. such fares are shown herein but under protest and S. P. Co. for itself and connecting carriers does not waive any of its rights to full published tariff fares and any payment at any less amount will be accepted as part payment only for the services performed." (Finding of Fact VI, Rec. 6.)

The Court of Claims, in its opinion, says that this protest is specific enough, but that it must be limited to "discharged soldiers," "the class, however, which involves the larger part of the claim" (Rec. 17). We submit that this is a very narrow construction of the protest.

Certainly, this protest, when attached to bills, rendered on a land-grant basis, for the transportation of applicants for enlistment and other persons not part of the "troops of the United States," was entirely adequate and sufficient to put the disbursing quartermaster on notice that plaintiff was stating said bills on such basis under protest. It could have no other meaning when attached to such bills.

What said protest says, is that "such fares," *i. e., land-grant fares*, are shown, in said vouchers, under protest, etc., giving as a reason therefor the fact that the Government accounting officers have held that they have no authority to allow or pay for the transportation of discharged soldiers (*i. e.*, persons not in the military service of the United States) more than the fares for troops of the United States.

Furthermore, as above shown, prior to the adoption of this long form of protest, plaintiff had been accepting payment of all of the several classes of transpor-

tation referred to herein on a land-grant basis, under protest, so that the disbursing quartermaster at San Francisco, to whom all such bills were presented, could have had no misunderstanding about the matter.

IV.

Powers and Duties of the Disbursing Quartermaster of the Army Who Paid the Bills Here in Question.

The powers and duties of the disbursing quartermaster of the Army at San Francisco, who paid the bills here in question, are of some importance in this case because the Court of Claims goes on to hold, in its opinion, that no protest, no matter how specific, against the requirement of land-grant deductions, attached to the vouchers presented by plaintiff to such officer, would have been sufficient to preserve the plaintiff's right to bring suit in that court for the amount of such deductions. (See Opinion, Rec. 16.)

The theory of the court, as expressed by Judge Downey, seems to be that, because a form of voucher has been prescribed by the Comptroller of the Treasury, under the authority of law, a railroad company that uses that form and certifies that the amount claimed is "correct and just," is precluded from thereafter claiming any other amount.

The statute referred to by the court is Sec. 5 of the Dockery Act (28 Stat. 206), which provides:

> "Sec. 5. The Comptroller of the Treasury shall, under the direction of the Secretary of the Treasury, prescribe the forms of keeping and rendering all public accounts, except those relating to the postal revenues and expenditures therefrom."

There is nothing in this statute, however, or in the form of voucher prescribed by the Comptroller of the Treasury referred to in this case, which precludes a railroad company from rendering its bills for Government transportation on a land-grant basis, under protest, and suing in the Court of Claims for the balances claimed to be due, where, under the rulings of the Comptroller of the Treasury (whose decisions are made binding upon the Executive branch of the Government by section 8 of the same Act), that is all that the Government will pay. On the contrary, under such circumstances, that would be the most natural and obvious thing to do, since it would be useless, under such circumstances, to claim the full commercial fares, as the only result of doing so would be to delay the payment of such parts of the amounts as, under the Comptroller's decision, could be lawfully paid by the Executive branch of the Government.

The certificate of the appellant that the account as stated was "correct and just," as called for by the prescribed form of Government voucher, is of no importance here. Said vouchers showed the amounts due on a commercial basis, and *also the amount claimed on a land-grant basis under protest*, and the correctness of both amounts so stated is not disputed in this case, nor the justness of the claim as so presented to the disbursing officer.

It is to be remembered in this connection, that the disbursing officers have no authority to pay any greater amount on an account than is unquestionably due under the decisions of the accounting officers of the Government or the Comptroller of the Treasury (now the Comptroller General). (See Decision of Comptroller Tracewell, December 17, 1897, 4 Comp.

Dec. 332). Hence, under the heretofore settled practice, all bills submitted to a disbursing officer must be limited to such amounts and supplemental bills presented to the accounting officers for any additional amount claimed, or suit in court instituted therefor.

The necessary result of the view announced by the Court of Claims in this case would be to prevent payment *by disbursing officers of the Government,* in cases such as that referred to here, of the amounts to which carrier is admittedly entitled, under the decisions of the Comptroller, and to necessitate the presentation of such bills at full commercial fares or rates, to the accounting officers of the Government. In other words, the authority of the disbursing officers will be curtailed *pro tanto,* and for no good purpose, since it would only mean circumlocution and delay in obtaining through the general accounting office what the disbursing officer would have paid in the first instance.

But the power and authority of the disbursing officers, including disbursing quartermasters of the Army, to pay claims against the United States out of moneys in their hands appropriated by Congress for the purpose, *is established by law and cannot be taken away by any action or ruling of the Comptroller of the Treasury or his successor, the Comptroller General.*

This was so held by the Attorney General in an opinion rendered the Secretary of War December 28, 1922 (33 Op. A. G. 383), in considering the scope and effect of a regulation issued by the Comptroller General, in General Regulations No. 13, dated November 25, 1922, requiring among other things that "Beginning January 1, 1923, the claims and demands of common carriers against the United States * * * shall be settled by the General Accounting Office," which reg-

ulation, the Attorney General said, would "not only eliminate all payment of transportation accounts by disbursing officers, but it will also largely eliminate the administrative examination of such accounts which is now made prior to or after payment."

In rendering the opinion just mentioned, the Attorney General said (*ib.*, p. 386):

> "The authority of the General Accounting Office as established by the Act of June 10, 1921, must be construed in the light of the prevailing practice of making payment for departmental expenditures through departmental disbursing officers. That this practice has received legislative sanction is shown by the numerous statutes defining the duties and functions of dsbursing officers."

The opinion of the Attorney General then refers to the statutes governing disbursing officers generally and quotes from several relating solely to disbursing officers of the Army, and concludes that (*ib.*, 388):—

> "The extent and variety of the foregoing legislation convince me that Congress intended, as to the government in general and as to the War Department in particular, that ordinary government payments should be made by disbursing officers."

The Attorney General therefore advised the Secretary of War, in substance, to disregard the aforesaid regulation of the Comptroller General as beyond the scope of his authority, stating that, in his opinion, the Secretary of War would not be justified, by anything in said regulation, "in failing to make, or in permitting or requiring disbursing officers under him to make,

payment as now authorized by law of transportation obligations created by and under authority of the Secretary of War."

Clearly, also, no judicial construction of the powers of the Government disbursing officers with respect to the payment of accounts against the Government, should be adopted which will unnecessarily curtail the authority conferred by law upon them to make what the Attorney General describes as "ordinary Government payments," and particularly payment "as now authorized by law of transportation obligations created by and under authority of the Secretary of War."

V.

SAVAGE, EXECUTRIX, v. UNITED STATES, 92 U. S. 382.

The Court of Claims cites the opinion of this court in the above mentioned case in support of its view that appellant could not preserve its right to payment in full for the transportation here in question by accepting payment from a disbursing officer on a land-grant basis under protest.

We submit that the two cases are materially different.

In the *Savage* case, the holder of the Treasury notes there referred to, while insisting that he was entitled to have them redeemed in gold, accepted payment in currency, as offered by the Secretary of the Treasury, and surrendered the notes. It was therefore held that his protest was ineffectual, because inconsistent with his actions.

It will be noted also that there, the holder of the notes *was paid in full* for the same, though in a dif-

ferent *medium* from that which he thought he was entitled to receive. Here, the carrier has only received *part payment* for the services it performed, and there was no inconsistency in its accepting such *part payment* under protest, the protest being manifestly proper and effective for the purpose of showing that the payment was not being accepted as in full.

VI.

The Procedure Followed by Appellant Was Not in Conflict With Any Departmental Regulation and Had the Approval of the Comptroller of the Treasury.

In the last analysis, the position of the Court of Claims is that there is something in the laws and Departmental regulations which prevent a carrier from accepting part payment of its claims for Government transportation from a disbursing quartermaster, *but that court has failed to point out any such law or regulations.*

As a matter of fact, under the settled practice, payments by disbursing officers for Government transportation, when not received under circumstances which indicate an acceptance in full satisfaction of the claim, have always been regarded by the accounting officers of the Government *simply as payments on account.* This is because, as above stated, disbursing officers had no authority to pay an account in a greater amount than authorized under decisions of the Comptroller of the Treasury. In such cases, the carrier has always been at liberty to present a supplemental bill for the additional amount due it, but if the matter were already concluded against it by the Comptroller's de-

cisions, such a proceeding would be useless and the carrier's remedy has always been by suit in the Court of Claims for the balance.

At the time the practices referred to in this case were going on the Comptroller of the Treasury, in an opinion rendered June 16, 1915 (21 Comp. Dec. 868), distinctly recognized the efficacy of a protest as to the insufficiency of a payment made by a disbursing officer to preserve the right of the carrier to present a claim for an additional allowance. It appears from that opinion that the Louisville & Nashville Railroad Company had billed for a shipment of household goods and professional books of an Army officer upon the basis of the household goods rating and book rating; that it accepted payment upon such basis *without protest*, and that thereafter it presented a supplemental bill to the Auditor for the War Department claiming household goods rating on the entire shipment, basing its claim upon a decision of the Comptroller of the Treasury rendered subsequent to the original payment. In affirming the action of the Auditor in disallowing the supplemental bill, Comptroller Downey said (*ib.*, 869.)

> "Had the claim for service been settled in the first instance by the auditor and properly settled under the decisions then in force, such settlement, unappealed from, would not be opened up because of a subsequent decision changing the rule. *A payment made by a disbursing officer does not stand on the same footing, and the right to file a claim with the auditor for an additional allowance is recognized;* but when service is rendered and payment is made by a disbursing officer in accordance with existing decisions and such pay-

ment is accepted as payment in full, *evidenced by the fact that there is no protest and no claim made for any other or additional allowance,* an attempt thereafter to predicate an additional claim on a subsequent decision changing the rule is not in principle essentially different from an attempt to open an auditor's settlement under the same circumstances."

The clear implication from this opinion of the Comptroller of the Treasury is that payment by a disbursing officer is not to be regarded as payment in full where the amount paid is accepted under protest,—and this although the bill as rendered to and paid by the disbursing officer contained the prescribed certificate of the carrier that the claim as presented was "correct and just."

In the motion to advance which we filed in this case (p. 6), which motion was supported by affidavit, we quoted a letter written by T. F. Powell, Chief, Transportation Branch, of the Finance Department, U. S. Army, under date of August 15, 1923, to Mr. Chas. H. Bates, of counsel in this case, in which was quoted an extract from a letter of the Comptroller General, dated October 9, 1922, addressed to Mr. E. R. Woodson, Secretary of the Railway Accounting Officers Association, in which the Comptroller General said:

> "*The stamping or writing a protest on the original bill and copies thereof does not conflict with regulations of this office,* but if it is desired thereby to have any matter therein considered by this office *where bills are stated by carriers at net fares or charges in accordance with the rulings of this office which the carriers are unwilling to ac-*

> *cept*, there should be set forth the objections to the bills as rendered, and a supplemental bill serves no particular purpose and unnecessarily increases and encumbers the files of this office."

In view of the above statement of the Comptroller General, Mr. Powell, in said letter, said:

> "In all cases where this office and the General Accounting Office are estopped from making payments by decisions of the Comptroller General or his predecessors, it is the opinion of this office that nothing would be gained by submitting supplemental bills *and that the proper procedure would be for the carriers to submit their claims for any additional charges to which they feel they are justly entitled to the Courts.*"

It is apparent therefore that the decision of the Court of Claims in this case is at odds with the views of the Comptroller of the Treasury and his successor, the Comptroller General, as to what the statutes of the United States and Departmental regulations require or permit in respect to the rendition of bills for Government transportation by carriers; that it was and still is entirely proper for the carriers to render, and for the disbursing officers of the Government to accept and pay, bills or vouchers for Government transportation in the reduced amounts which such disbursing officers of the Government could pay, under the decisions of the Comptroller of the Treasury, under protest, made upon the face of such bills or vouchers, and that such procedure would be sufficient to save the carriers' right to sue in the Court of Claims for the balances claimed to be due.

VII.

No Estoppel by Reason of the Restrictive Provisions of the Army Appropriation Acts.

While recognizing that the several classes of persons referred to in this case are not embraced within the term "troops of the United States," as used in the railroad land-grant Acts, the Court of Claims, in its opinion (Rec., 24-26), proceeds to hold that the provisions in the Army Appropriation Acts, beginning with the Act of March 2, 1913, making appropriations for the fiscal year July 1, 1913, to June 30, 1914 (37 Stat. 704, 715-716), restricting payments to land-grant railroads, precludes any further recovery by plaintiff because of its acceptance of payment out of the appropriations made by said Acts, even though such acceptance was under protest against the requirement of land-grant deductions.

In order to sustain this view, the Court of Claims, in its opinion, says (Rec., 26):

> "If it be said that the provisions of this act may not be here invoked against the plaintiff because it has been held that the classes of persons here involved are not 'troops' of the United States, it is sufficient to say that for transportation purposes at least Congress saw fit to so treat them, and by making their transportation payable out of this particular appropriation it necessarily made these payments subject to the conditions attached to the expenditure of the moneys appropriated for that purpose."

Unfortunately, for this view, the Court of Claims is in error when it says that Congress, in the legislation

referred to, has treated the classes of persons referred to herein as "troops of the United States" and made their transportation subject to the conditions attached to the expenditure of the moneys appropriated by said Acts. A careful reading of the provisions referred to make its error perfectly clear.

We quote the following from said Army Appropriation Act of March 2, 1913 (37 Stat. 704, 715-716):

> "TRANSPORTATION OF THE ARMY AND ITS SUPPLIES: For transportation of the Army and its supplies, including transportation of the troops when moving either by land or water and of their baggage, including the cost of packing and crating; for transportation of recruits and recruiting parties; of applicants for enlistment between recruiting stations and recruiting depots; for travel allowance to enlisted men on discharge; of persons on their discharge from the United States military prison or from any place in which they have been held under a sentence of dishonorable discharge and confinement for more than six months, or from the Government Hospital for the Insane after transfer thereto from such prison or place, to their homes (or elsewhere as they may elect), provided the cost in each case shall not be greater than to the place of last enlistment; of supplies furnished to the militia for the permanent equipment thereof; of the necessary agents and other employees; of clothing and equipage and other quartermaster stores from Army depots or places of purchase or delivery to the several pos and Army depots and from those depots to the troops in the field; of horse equipment; or ordnance and ordnance stores, and small arms from the foundries and armories to the arsenals, fortifications, frontier posts, and Army depots; for payment of wharfage tolls and ferriage; for transportation of funds

of the Army; for the hire of employees; for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts), but in no case shall more than fifty per centum of full amount of service be paid: *Provided*, That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large and shall be accepted as in full for all demands for such service: *Provided further*, That in expending the money appropriated by this Act a railroad company which has not received aid in bonds of the United States, and which obtained a grant of public land to aid in the construction of its railroad on condition that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval, and other Government services, and also subject to such regulations as Congress may impose restricting the charge for such Government transportation, having claims against the United States for transportation of troops and munitions of war and military supplies and property over such aided railroads, shall be paid out of the moneys appropriated by the foregoing provision only on the basis of such rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed fifty per centum of the compensation for such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service. * * * "

In reading this section it will be noticed, in the first place, that Congress provides therein (1) "for transportation of the Army and its supplies, including transportation of the troops," etc., and then for the transportation (2) "of applicants for enlistment between recruiting stations and recruiting depots;" (3) "for travel allowance to enlisted men on discharge;" (4) "of persons on their discharge from the United States military prison," etc., and (5) "of the necessary agents and other employees."

Here then, at the outset, is a differentiation in these Army Appropriation Acts between troops and persons who have ceased to be or never were troops. This differentiation, as embraced in earlier Army Appropriation Acts, was referred to by Mr. Justice Brandeis, in delivering the opinion of this court in the Union Pacific case (249 U. S. 354, 358).

In the next place, the restrictive provisions which the Appropriation Act of March 2, 1913, then proceeds to impose upon the use of the moneys appropriated by said Act for the payment of land-grant railroads for Army transportation, are in fact limited to the transportation of troops and property of the United States over such roads.

The first restrictive provision in said Army Appropriation Act is:

> "for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts), but in no case shall more than fifty per centum of full amount of service be paid": *Provided,* "That such compensation shall be computed

> upon the basis of the tariff or lower special rates for like transportation performed for the public at large and shall be accepted as in full for all demands for such service:"

It is necessary to consider the parenthetical statement, in this provision, "(to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts,)" in order to understand the extent of the restrictions thereby made. The decisions of the Supreme Court referred to were, *Lake Superior and Mississippi Railroad Company* v. *United States,* and *Atchison, Topeka and Santa Fe Railroad Company* v. *United States,* decided at its October Term, 1876 (93 U. S. 442), in which cases it was held, as stated in the headnote to the opinion:

> "A provision in an act of Congress, granting lands to aid in the construction of a railroad, that 'said railroad shall be, and remain, a public highway for the use of the Government of the United States, free from all toll or other charge, for the transportation of any property or *troops* of the United States,' secures to the Government the free use of the road, but does not entitle the government to have *troops* or property transported over the road by the railroad company free of charge for transporting the same."

This court therefore held that the railroad companies referred to were entitled to receive "compensation for all transportation performed by them, respectively, of troops and property of the United States (excepting the mail), subject to a fair deduction for the use of their respective railroads."

It appears therefore that the only reservation made by this class of Acts, to the United States, was the

privilege only of a "free highway" for the transportation of "troops and property of United States." So that the restrictions in the Army appropriations as to the payment of this class of railroads for Army transportation must be confined to the transportation of "troops and property of the United States."

Subsequent to the above-mentioned decisions of this court, the War Department agreed with the Atchison, Topeka & Santa Fe Railroad Company upon 33-1/3% as a fair deduction to be allowed by the Government on account of the statutory reservation as to the free use of the land-grant highway of its road with respect to transportation of troops and property of the United States occurring between March 31, 1874 and April 1, 1875; the Department later tried to avoid this agreement, and in a suit concerning the matter the Court of Claims decided that said deduction of 33-1/3% was a fair and reasonable one, indeed, intimating that but for said agreement "the deduction which would be made would fall short of that agreed upon, and the defendants be liable for a heavier judgment than that which they are seeking to set aside." (*A. T. & S. F. R. R. Co.* v. *United States*, 12 C. Cls. 295, 304.)

When, therefore, Congress, after this last-mentioned decision of the Court of Claims, in the Army Appropriation Acts, provided for the payment of land-grant rates for Army transportation, "to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts," but that "in no case shall more than *fifty* per centum of full amount of service be paid," it presumably had in mind the ruling of the Court of Claims that 33-1/3% was a reasonable allowance to the Government for the "free highway" privilege which it had reserved in

this class of railroad land-grant Acts "for the transportation of any property or *troops* of the United States," and intended only to foreclose suit in that court for any greater amount for *such* transportation.

Clearly, Congress was not, in said statutes, attempting to stipulate that land-grant railroads of this class should only receive fifty per centum of the full amount of the service with respect to *all* transportation service performed by it for the War Department, regardless of whether or not the persons or property transported were "troops and property of the United States."

That Congress, in said restrictive provisions of the Army Appropriation Acts, was only fixing a maximum compensation of fifty per centum of the commercial rates for the transportation of *troops* and property of the United States over any such railroad is further apparent from the next proviso in said Army Appropriation Act with reference to railroad companies which had obtained a grant of public land to aid in the construction of its railroad "on condition that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval and other Government services, and also subject to such regulations as Congress may impose restricting the charge for such Government transportation." Said statutes refer to claims of the latter class of railroads against the United States "for transportation of *troops* and munitions of war and military supplies and property over such aided railroads," and provide that they "shall be paid out of the moneys appropriated by the foregoing provision only on the basis of such rates for the transportation of *such troops* and munitions of war and military sup-

plies and property as the Secretary of War shall deem just and reasonable under the foregoing provision," adding "such rate not to exceed fifty per centum of the compensation for such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service."

Referring to these restrictive provisions of the Army Appropriation Acts, the Comptroller of the Treasury, in a decision rendered January 22, 1919 (25 Comp. Dec. 520, 523), said:

> "It appears to have been the practice, without any definite determination by the Secretary of War of what rate should be deemed just and reasonable, to adopt the authorized maximum of 50 per cent of tariff rates as the basis of settlement for the transportation of property and *troops* of the United States over said railroads.
>
> It appears to have been the purpose of Congress, *though with slightly different form of language*, to authorize the payment of transportation of property and *troops* for the United States over both these classes of land-grant railroads *on the same basis*, unless otherwise determined by the Secretary of War, as provided for the second class of roads."

We submit therefore that the Court of Claims erred in holding that these restrictive provisions preclude any further recovery in that court by a carrier who has accepted payment on the land-grant basis, under protest, out of moneys appropriated by the Army Appropriation Acts for the transportation of persons im-

properly held by the accounting officers of the Government to be "troops of the United States."

Furthermore, the legislative intention in the matter is shown by an additional proviso which has been inserted after the aforesaid restrictive provisions in the Army Appropriation Acts, beginning with the Army Appropriation Act approved August 29, 1916 (39 Stat. 619). This proviso reads (*ib.*, 634):

> "*And provided further,* That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts."

A similar proviso has been contained in all subsequent Army Appropriation Acts.

This proviso was made necessary because of the refusal of the Comptroller of the Treasury, in a decision rendered Dec. 14, 1915 (22 Comp. Dec. 263), to pay full commercial rates for the transportation of Army officers' personal effects notwithstanding the decision of the Court of Claims of February 8, 1915, in *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States* (50 C. Cls. 412), holding that Army officers' personal effects were not property of the United States, the Comptroller of the Treasury, in the decision referred to, taking the position (now attempted to be applied by the Court of Claims in this case) that he was precluded, by the aforesaid restrictive provisions of the Army Appropriation Acts, from paying

out of the appropriations made by said Acts, more than 50 per cent for "Army transportation" by land-grant railroads.

The additional proviso added by Congress and inserted after said restrictions in the Army Appropriation Acts is a legislative construction of those restrictions which should be respected by the courts, and makes it clear that Congress never intended (as stated therein) "to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts."

VIII.

Effect of the Rule Announced by the Court of Claims.

The result of the ruling announced by the Court of Claims in this case would be to require the carriers, in every instance where they question the correctness of the rulings of the accounting officers as to rates or fares to be applied to the transportation of persons and property for the Government, to present their bills for the full amounts claimed by them to be due to the General Accounting Office, and then to protest the settlements of that office, thus eliminating entirely the disbursing officers, since the authority of the latter is limited to paying or refusing to pay bills as rendered. The only effect of this procedure would be to throw upon the General Accounting Office the duty of reducing such bills to a land-grant basis and to delay the settlement of the accounts of the railroads, the result

otherwise being the same as if the bills had been originally presented to the disbursing officer on a land-grant basis under protest. The circumlocution thus entailed accomplishes no good purpose, since in instances of the character here referred to the General Accounting Office has already ruled as to the basis on which it would authorize payment.

The decision of the Court of Claims, in this respect, is objectionable, we understand, to the War and Navy Departments of the United States, through which most of the transportation of persons and property for the Government occurs, besides curtailing, in large measure, the duties of the disbursing officers of the Government within the field of their lawful authority. Moreover, it affects not only differences as to the application of *land-grant deductions* to the transportation of passengers and property of the United States, but *all other differences as to rates and fares between the carriers and the Government,* as it would deprive the carriers of their right to accept from disbursing officers, under protest, the amounts which might be payable under decisions of the Comptroller General, and to present claims for the disputed amounts, in any case whatsoever, notwithstanding that rates and fares in interstate commerce are established and published in pursuance of Statutes of the United States.

The decision of the Court of Claims in this case is also, as above shown, in conflict with the express ruling of the Comptroller General sanctioning the practice by the railroad companies of rendering their bills for Government transportation in the reduced amounts, authorized to be paid by his decisions, under protest, with a view to taking the matter in dispute to the Court of Claims.

IX.

The Decision of the Court of Claims in This Case is Also in Conflict with its Previous Rulings.

Thus, in *James A. Baker, Receiver of the International & Great Northern Ry. Co., v. The United States*, (No. 34613), decided by the Court of Claims June 28, 1920 (55 Ct. Cls. 537), the Court of Claims gave judgment for the plaintiff, in a case identical in all substantial respects with the present case, as appears from the following findings of fact made by the Court, together with its "Conclusion of Law" therein:

"II.

"From the month of May, 1915, to and including the 16th day of June, 1916 [*i. e.*, during a portion of the period covered by the suit at bar], at the instance and request of proper officers of the United States Army, and in exchange for the regular United States Army transportation requests, plaintiff furnished transportation for large numbers of applicants for enlistment in the army, discharged military prisoners, and discharged retired and furloughed soldiers.

"III.

"For the transportation thus furnished, plaintiff rendered his bills to the disbursing officers of the army and the accounting officers of the Treasury as follows: [Here follows list of bills:]

"All of said bills were settled by the disbursing and accounting officers of the Government by applying to the transportation charges land grant rates under certain rulings of the Comptroller of the Treasury that the classes of passengers stated were troops of the United States within the mean-

ing of the land grant acts, and the aggregate amount of the reductions thus accomplished was and is the sum of $6,483.21.

"IV.

"In rendering said bills plaintiff stated them at land grant rates, in order to avoid their correction and return by disbursing officers, and adopted and followed the practice of entering a protest on the face of the bill against the application of land grant rates to transportation of the character specified.

"CONCLUSION OF LAW.

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $6,483.21 on authority of the *Union Pacific Case*, 52 C. Cls. 226; 249 U. S. 354. It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of six thousand, four hundred and eighty-three dollars and twenty-one cents ($6,483.21)."

As only the judgment of the Court of Claims in said case is reported, we are filing a certified copy of said findings of fact and conclusion of law therein.

CONCLUSION.

If appellant be held entitled to recover all the amounts required to be deducted on account of land-grant after January 1, 1914, when it commenced protesting the same, judgment should be directed for $147,322.72 ($71,560.92, shown by Finding of Fact VII, plus $75,467.74, shown by Finding of Fact VIII, plus $294.06, shown by Finding of Fact IX).

If appellant's recovery be limited to the items of transportation which were protested, judgment should be directed for $75,149.62 ($24,176.62, shown by Finding of Fact VII, plus $50,678.94, shown by Finding of Fact VIII, plus $294.06, shown by Finding of Fact IX).

Respectfully submitted.

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